IN THE

Supreme Court of the United States

October Term, 1987

No. 87-2123 (4)

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
an agency of the State of Florida, Petitioner,

v.

MID-FLORIDA GROWERS, INC. and
HIMROD & HIMROD CITRUS NURSERY, Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

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INDIAN RIVER CITRUS LEAGUE
HANCOCK HOLDING COMPANY
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Lykes Bros. Inc., Ben Hill Griffin, Inc., Bowen Brothers, Inc., Citrus World, Inc., Becker Holding Co., Alcoma Packing Company, Inc., Diamond R Fertilizer Co., Inc., Graves Brothers Co., Latt Maxcy Corporation, Smoak Groves, Inc., Nevins Fruit Co., Inc., Lost Lake Groves, Inc., P.H. Freeman & Sons, Inc., Cooperative Fruit Company, Jessamine Garden Groves, Inc., West Coast Growers Cooperative, Indian River Citrus League, Hancock Holding Company, Winter Haven Citrus Growers, and Derrill S. McAteer, hereby move for leave to file the attached Brief *Amici Curiae* in this case. The consent of the Attorney for Petitioner has been obtained. The consent of the Attorney for Respondents was requested but refused.

The interest of the above described Amici Curiae arises from the facts stated below.

All but one of the Amici Curiae are citrus growers or cooperative associations of citrus growers in the State of Florida, collectively producing more than ten percent of all citrus fruit grown in Florida, and are regulated by the Petitioner, Florida Department of Agriculture and Consumer Services ("FDACS"). The non-citrus grower Amicus, Diamond R Fertilizer Co., Inc., is involved in sales of fertilizer to citrus growers. All of the Amici Curiae have an interest in protecting citrus groves from the ravages of citrus canker and other plant pests and diseases.

The Amici Curiae believe that the decision of the Florida Supreme Court [*Department of Agriculture and Consumer Services v. Mid-Florida Growers, Inc. and Himrod & Himrod Citrus Nursery,* 521 So.2d 101 (Fla. 1988)] will greatly affect the ability of the United States Department of Agriculture ("USDA"), and FDACS to regulate plant pests and diseases. The Amici Curiae believe that any hesitation by these regulatory agencies in exercising their powers to regulate plant pests and diseases could result in the introduction, release, proliferation, and establishment of undesirable and economically disastrous plant pests and diseases in Florida.

All Florida citrus growers and related industries have in the past received the benefits of regulation by these agencies, including the prevention of spread of plant pests and disease within the State of Florida, and the prevention of introduction of plant pests and diseases from sources outside the State of Florida. Likewise, the citrus growers have suffered the burdens of regulation in complying with the agency's rules and regulations, including the loss of plant material required to be destroyed due to infestation or exposure to plant pests or diseases. Some of the citrus growers appearing as Amici Curiae in this Brief suffered outbreaks of citrus canker in their groves or nurseries, and as a result had their citrus plants and trees burned by FDACS and USDA as part of the citrus canker eradication program in Florida.

The citrus growers wish to support the position of the Petitioner in seeking a writ of certiorari because the citrus growers believe that eradication programs, such as the citrus canker eradication program carried out in Florida, are necessary to protect all interests in citrus in the State of Florida. The citrus growers fear that the decision of the Supreme Court of Florida will result in large compensation awards which will inhibit and deter FDACS and USDA from adequately regulating plant pests and diseases in the future. All citrus and other agricultural interests in Florida may be placed at risk by lack of effective regulation.

Citrus canker is only one of many known citrus pests and diseases. Florida citrus growers are already battling numerous citrus pests while many other pests, known to exist in foreign lands have not been introduced or established in Florida or have previously been eradicated. New or unknown pests and diseases regularly arise, either due to importation from foreign sources, or from other unpredictable sources, such as mutation of viral, fungal and bacterial organisms. For these reasons, Florida citrus growers and regulatory officials must continually plan and prepare for the appearance of new pests on Florida citrus. Neither the USDA, FDACS, or any group of recognized scientific experts are able to predict the appearance or behavior of new, unknown, or alien pests and diseases on Florida citrus. The ultimate effects of new, unknown, or alien pests and diseases on Florida citrus

are never fully known even with years of laboratory analysis and scientific testing. For these reasons, an early eradication of new, unknown, or alien pests is essential to the protection of Florida citrus. The maintenance of a disease-free citrus environment in Florida requires that new, unknown, or alien plant pests and diseases be detected and eradicated while the infestation is contained in a small area. Delay or hesitance in initiating eradication programs is likely to permit the infestation to expand to a level that precludes any feasible eradication effort and results in insurmountable losses to the Florida citrus industry and the associated support interests.

A regulatory agency's evaluation of the most appropriate method for controlling plant pests and diseases is an extremely difficult task involving scientific identification of the pest or disease, delimiting the area affected by the disease, analyzing the expected method and rate of spread, and the means available to prevent spread. All of these conditions require extensive scientific study and analysis, whereas the agency is generally required to take action, in advance of complete scientific study and analysis, immediately upon the appearance of a virulent and apparently devastating pest or disease. Scientific controversies and uncertainties frequently occur during the development of scientific data needed to design appropriate programs for control or eradication of plant pests and diseases. If scientific certainty is required prior to agency action, the regulatory agencies will be unable to exercise their statutory powers and duties, and may be required to delay action until the disease or pest has become so widespread that eradication efforts would be futile.

Citrus canker, if established in Florida, would require the citrus growers to institute drastic and expensive treatment and control measures such as frequent application of copper spray to citrus trees, defoliation or destruction of infected trees, disinfection of all equipment and personnel moving through citrus groves, and greater security measures in and around groves.

The citrus growers face threats of embargoes from other citrus growing states and nations if plant pests and diseases, such as

citrus canker, become established in Florida. The potential cost of such embargoes, in terms of lost sales to other citrus growing regions alone would exceed $359 million! The citrus growers fear that public knowledge of the lack of effective pest or disease control in Florida, or public awareness of the treatment of Florida citrus with excessive chemical sprays such as copper will cause irreparable damage to the reputation of Florida citrus and that consumer acceptance of and demand for Florida citrus may decline.

Neither the Respondents nor any of the other nurseries subjected to eradication procedures have received compensation other than the amounts appropriated by the Florida Legislature and the USDA, as described in the Petition. No funding source for payment of pending and potential damages claims for canker eradication has been created in Florida, but if the State of Florida is forced to pay these claims the Amici Curiae anticipate that the necessary revenues will be raised from the citrus industry, primarily the citrus growers, while the funds would benefit only one small segment of the industry, the nurserymen.

In summary, the citrus growers stand to lose not only the benefits of regulation in attempting to maintain a disease-free environment, but also their valuable property interests in citrus, and may be subjected to additional costs, trade embargoes or quarantines, as well as irreparable damage to the reputation of their citrus products.

The points which Petitioner has not and cannot adequately address are the citrus growers' rights as property owners to have their uninfected groves protected by adequate regulation, the economic impact of trade embargoes, increased costs to growers to battle the spread of disease from neighboring properties, and potential decline in marketability of and demand for Florida citrus. The Petitioners have not addressed the potential loss of

1. See Florida Department of Citrus, Monthly Report dated June 20, 1988, "Florida's Fresh Fruit Shipments 87-88." The lost sales figure represents only a part of the economic effects of loss of these markets. Other effects would include a general depression of fruit prices due to the resulting glut of fruit going into other markets.

productivity in commercial citrus groves if citrus canker is permitted to spread to and damage existing groves. These concerns are of particular importance to the commercial growers. In general, the citrus growers have a greater familiarity with the effect on commercial citrus growers of the Florida court's ruling, and can provide a different perspective than that submitted by the Department as to the needs of the citrus and agricultural industry as a whole.

Respectfully submitted,

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STATUTES INVOLVED

The statutes, constitutional provisions, and regulations involved are as stated in the Petition at pages 6 and 7, and as quoted in the Appendix to the Petition at pages 19 through 43.

INTEREST OF AMICI CURIAE

The interest of the Amici Curiae is set forth in their Motion for Leave to File this Brief Amicus Curiae.

ARGUMENT

THE FLORIDA COURT'S FINDING OF A "TAKING" OF PRIVATE PROPERTY FOR PUBLIC USE IN THE CIRCUMSTANCES PRESENTED (a) FAILS TO RECOGNIZE THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE, AND (b) CONFLICTS WITH DECISIONS OF THIS COURT, OF FEDERAL CIRCUIT COURTS OF APPEAL, AND OTHER STATE COURTS OF LAST RESORT.

The problem presented in this case is not new. Man's farming efforts have been plagued since Biblical, and even prehistoric times, with destruction of crops by pests and diseases. The ability to control pests and diseases is primarily a phenomenon of the last century, when scientific information concerning the origin and proliferation of such pests first became available. Agricultural regulation began in the United States in the early Twentieth Century in response to the public need for protection from insects and diseases which frequently consumed the agricultural crops of this nation. Agricultural regulations have often required the destruction of plants and animals infected by or exposed to a communicable disease. Prior to the decision below, no court, to the knowledge of these amici curiae, has required compensation for a *reasonable* police power regulation requiring destruction of such plants or animals.

Agricultural growers have always been concerned with the introduction and proliferation of new plant pests and diseases which have the potential ability to destroy their crops. Citrus growers, likewise, have consistently participated in eradication programs directed at eliminating a dangerous organism from an infected area. Complete eradication of a pest or disease requires the detection and eradication of all known organisms, usually by destroying the host plant. Eradication programs have been conducted for numerous citrus pests, including Mediterranean fruit fly, burrowing nematode, tristeza, and citrus canker. Quarantine regulations have been uniformly adopted to prevent introduction of destructive pests. Anticipatory programs, such as the Citrus Canker Action Plan, have provided procedures to be followed when a known pest appears in the United States. These action plans are a result of ongoing scientific study of potential pests and diseases.

In addressing a new disease, both regulatory officials and members of the agricultural industry must rely on available scientific data and technology. A disease imported from a foreign nation, as most of the current agricultural pests have been, may adapt or behave in unexpected ways, in response to, for example, climatic growing conditions and native plants in Florida. Scientific certainty as to the long range effects of any new pest or disease is impossible, but swift regulatory action to combat the pest is necessary since any delay in controlling or eradicating the pest may allow it to spread beyond the reach of any effective eradication or control measure.

Most plant pests and diseases are known to multiply at a geometric rate, based on the numerical population of the disease organism or pest in the environment. In the early stages of an infestation, the population is small, and at that stage eradication is most effective. Any delay in responding to the infestation allows the population of the organism to grow and the area of infection to spread, thus requiring much broader application of eradication and control procedures. For these reasons, early measures to control small infestations are absolutely essential to effective pest

or disease control! This principle has been the fundamental basis for agricultural regulation.

The citrus industry of Florida is the State's second largest industry, and annually generates revenues of approximately $2.5 billion in total sales. With associated support industries for processing, shipping, packing, and marketing, the total annual economic activity related to citrus production in Florida is $7 billion. [2] The total acreage of Florida devoted to citrus production is 642,856 acres, which represents a large portion of Florida's arable land.

The Amici Curiae believe the Petitioner Department of Agriculture and Consumer Services has correctly stated the legal principles to be followed in determining whether health and safety regulations, or nuisance type regulations, are takings requiring just compensation under the Fifth Amendment of the United States Constitution. Particularly in the agricultural industry, these regulations are for the common benefit of all agricultural interests, and thus provide the "reciprocity of advantage" essential to maintaining the health, welfare and safety of the entire industry. Contagious or communicable pests and diseases, if allowed to exist on any person's property, pose a threat of transmission to all neighboring properties, and in some instances to distant properties (if an exchange of infected or exposed plant material, equipment, tools or personnel is allowed to take place). Wind, rain, insects and birds, which are some of the primary means of spreading plant pests and disease, follow no predictable territorial boundaries and cannot be confined to a particular property, county, or state. One property owner, if permitted to maintain a communicable disease on his property, poses a threat to all neighboring properties.

The "reciprocity of advantage" as applied to agricultural

1. *See generally,* T. EMMEL, *Ecology & Population Biology,* 78-98 (1973) ("The more individuals are added to the population, the faster it increases, because all those that are added also breed and hence increase the total growth rate of the population. The process is similar to bank interest compounded daily . . .". *Id.* at 85.)

2. Statistics provided by the Economic Research Department of the Florida Department of Citrus, Gainesville, Florida.

interests is that although each person is burdened to some extent by regulation of plant pests and diseases, each benefits from the regulation of his neighbors. The primary burden of regulation is that when property, with or without fault, is infested by or exposed to an infectious plant pest or disease, and this exposure poses a substantial threat, the exposed property must be destroyed before the disease spreads to another's property. Each owner expects his neighbor to do likewise if this neighbor's property harbors a pest or disease that threatens his own property. Only in this manner is effective regulation achieved.

The Amici Curiae will not reiterate here the compelling arguments made by the Petitioner, setting forth the "nuisance exception" to the takings clause as clearly defined in *Mugler v. Kansas,* 123 U.S. 623 (1887); *Miller v. Schoene,* 276 U.S. 272 (1928); and *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. ____, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). The Amici Curiae merely concur that the current regulatory environment is intolerable, and that the continued existence of a healthy agricultural community in this nation requires that regulatory agencies be permitted to respond reasonably, based on available scientific data and technology, to public dangers such as citrus canker. Effective regulation cannot be achieved where regulatory agencies face massive liability for unanticipated takings.[3]

The Petition filed by the Florida Department of Agriculture and Consumer Services refers to Executive Order 12630, issued by President Reagan on March 15, 1988, entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights." 53 Fed. Reg. 8859. This executive order required the United States Attorney General to promulgate "Guidelines for the Evaluation of Risk and the Avoidance of Unanticipated Takings" which had not yet been published at the time the Petition

3. In the few weeks since the filing of the Petition in this case, three additional "takings" law suits have been filed against FDACS. These three claims represent approximately 15% (2.75 million plants) of the total number of canker infected or exposed plants destroyed.

was filed, but became available July 1, 1988.[4] These Guidelines provide a persuasive framework for the development of legal principles distinguishing health and safety regulations from land use regulations in the "takings" analysis. The Guidelines state, in part, at pages 15 and 16:

> **Public Health and Safety**
>
> Policies or actions undertaken to protect public health and safety are ordinarily given greater latitude by courts before being held to give rise to takings. For purposes of that deference, however, the Supreme Court has ruled that 'public health and safety' is not coextensive with the government's power to act. Public health and safety represents a component of that broader power. Again, that governmental power exists does not mean that its exercise is free of takings concerns. The deference discussed here extends only to public health and safety interests.
>
> a. Where public health and safety is the asserted regulatory purpose, then the health and safety risk posed by the property use to be regulated must be identified with as much specificity as possible and should be 'real and substantial.' That is, it must be more than speculative. It must present a genuine risk of harm to public health and safety and the claim of risk of harm must be supported by meaningful evidence, in light of available technology and information, that such harm may result from the use to be regulated.
>
> b. Any action taken to regulate property use for public health and safety purposes must address the health and safety risk; that is, it must be

4. The Guidelines have not been published in the Federal Register, but are avialable upon request from the Attorney General. A copy of the Guidelines have been filed with the Clerk of this Court.

designed to counter the identified risk and must substantially advance the public health and safety purpose. The action should also, within the limits of available technology and information, be no more restrictive than necessary to alleviate the health and safety risk created by the use to be regulated.

c. In assessing these issues, an agency should examine the following facts:

(i) The certainty that the property use to be regulated poses a health and safety risk in the absence of government action; and

(ii) The severity of the injury to public health and safety should the identified risk materialize, based on the best available information in the field involved.

From the perspective of a takings implication analysis, the greater the certainty or the greater the severity, the more stringent measures are justified.

d. Although the ideal is that the response taken to counter the risk be 'no greater than' the risk posed, reasonable proportionality presupposes available technology and information.

If these Guidelines are applied to the instant case, the record supports the following conclusions:

(a) The health and safety risk of citrus canker was identified with specificity, and the risk was real and substantial, as demonstrated by the consensus of scientific experts in developing the Citrus Canker Action Plan. There was no doubt that citrus canker presented genuine risk of harm based on available technology and information, as reflected in the Action Plan and in the recommendations of the technical advisory committees, which forcefully recommended that federal and state regulatory officials institute an immediate eradication program as to both infected and exposed plants.

(b) The action taken did address the risk posed by citrus canker, was consistent with the recommendations of scientific and technical advisers, and was no more restrictive than necessary to alleviate the risk created. Respondents' own expert witness testified at trial that he too voted in favor of, even seconded the motion, to adopt the emergency rule which resulted in destruction of Respondents' exposed plants.

(c) In assessing the risk posed by the outbreak of citrus canker in Florida the regulatory agencies (i) determined the apparent virulence (ability to spread) of the organism found at Ward's Nursery in August 1984 based on the number of trees infested there, the apparent rate of spread, and the fact that the bacteria spreads invisibly to nearby plants which may harbor the bacteria without symptoms for many months; and (ii) determined that citrus canker can cause severe damage to citrus plants by causing leaf drop, defoliation, fruit drop, reduction in tree growth and fruit production, fruit blemish, and eventually tree decline. In other words, the scientific community knew with relative certainty that severe injury to the citrus industry of Florida would occur if citrus canker became widespread.[5]

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5. The background statement to the interim rules issued by USDA on September 14, 1984, contains the following discussion of citrus canker which reflected the scientific knowledge at that time:

> "Citrus canker, Xanthomonas campestris pv. citri (Hasse) Dawson, is a devastating bacterial disease which is known to infect plants and plant parts of citrus and citrus relatives (Family Rutaceae). Strains of citrus canker can cause defoliation and other serious damage to the leaves, twigs, and fruit of such plants. It can be a very aggressive disease. It can rapidly infect plants and plant parts, and can cause the destruction of entire citrus growing areas. The establishment of citrus canker in the United States would present a severe threat to citrus producing industries in the United States and pose a burden to interstate and international commerce.
>
> An infestation of citrus canker was found in plants in a nursery in Polk County, Florida, on August 27, 1984. As a result of investigations and surveys by inspectors of Plant Protection and Quarantine (PPQ), a unit within the Animal and Plant Health Inspection Services, U.S. Department of Agriculture, and officials of the Florida Division of Plant Industry (FDPI), a unit within the Florida Department of Agriculture and Consumer Services, it has been determined that plant cuttings from infested nursery stock and plants exposed to infected nursery stock have been sent to over 40 other nurseries and numerous commercial citrus groves for planting in at least 17 counties in Florida. These surveys and

(d) The agency response, i.e. the emergency rules and quarantine regulations, followed available scientific technology and information in designating the infected and suspect trees to be destroyed, and in enacting other measures to prevent the spread of citrus canker to uninfected areas.

If the legal principles concerning the validity of this kind of health and safety regulation were clarified as requested in the Petition, takings issues in these cases should not arise, absent a court finding that the agency determination of public health risk or the measures taken in response to the perceived risk were arbitrary and unreasonable. Sadly, the current case law presents only hazy guidelines, resulting in the regulatory crisis reflected in Executive Order No. 12630, and court decisions such as that of the Supreme Court of Florida below. The legal rules, specifically the decisions of this Court, must be clarified in order to permit agencies administering health and safety regulations to regulate responsibly, free from the threat of unanticipated takings claims.

The memorandum of law published as an Appendix to the U.S. Attorney General's Guidelines is consistent with the legal theories espoused in the Petition, but shows the difficulty of predicting whether a regulatory action will constitute a taking. The Attorney General's memorandum states that the courts have evidenced a 'hesitance' to find takings where the purpose of regulation is to restrain uses of property that are tantamount to nuisances, and that the "reciprocity of advantage" test ("that, in demonstrable

investigations are continuing, but complete identification of all areas in Florida to which the citrus canker infestation has spread has not yet been determined.

Further, the strain of the bacterial pathogen which causes the form of citrus canker now in Florida has not previously been described. However, intensive pathological studies are underway to determine the full host range, possible effect on fruit, and other pathological characteristics of this particular strain.

Officials of PPQ and FDPI have begun an intensive citrus canker eradication program in the infested areas of Florida. However, since this disease could have spread throughout the State, it is necessary to designate the entire State of Florida as a quarantined area and regulate the interstate movement of certain articles from any place in Florida in order to prevent the artificial spread of the citrus canker to noninfested areas of other States." 49 Fed. Reg. 36623.

ways, each who is regulated benefits from similar regulations of others''[6]) is an important factor in obtaining judicial deference. The Attorney General's memorandum observes, however, that the result of any regulatory takings analysis "is not fully predictable."[7]

The Amici Curiae submit that the result of a takings analysis, especially as to health and safety regulations, should be predictable and indeed must be predictable to insure the continuance of an effective regulatory environment, not only in Florida but throughout the United States.[8] Regulatory officials will be unlikely to destroy infected or exposed plants or animals if they know that they are, in effect, "buying" them at full value.

As suggested in the Attorney General's Guidelines, regulatory response to public health and safety risks must be reasonably proportional to the identified risk, and be no more restrictive than necessary to alleviate the risk. However, these determinations must be made "within the limits of available technology and information," and the ideal of reasonable proportionality "presupposes available technology and information." The information available to FDACS, USDA and the scientific and agricultural community in this case demanded a swift canker eradication program, and required destruction not only of visibly infested plants, but of suspect plants or trees which had been in close proximity to the infested plants and therefore were exposed to and capable of harboring citrus canker. The Florida court's characterization of the plants as "healthy" belies the known fact that these plants were at substantial risk of developing citrus canker. Six nurseries that had received budwood from Ward's Nursery, where citrus canker was first detected, and two that had received plants from Adam's Nursery which received the infection from Ward's, had already tested positive for citrus canker. It was a proven fact that canker had been spread by the movement of

6. Guidelines Appendix Part III, F, 5 at pages 12-13, reproduced at A-1 and 2, *infra*.

7. Guidelines Appendix Part III, F, 4 at page 11.

8. The Solicitor General should be invited to file a brief in this case, since the issue presented vitally concerns the USDA as well as other federal agencies administering health and safety regulations.

plant material from Ward's. The available information did not allow FDACS to wait for Respondents' plants to exhibit visible symptoms.

Effective agricultural regulation requires participation by both state and federal agricultural agencies because agricultural pests and diseases do not confine themselves within state lines. The State of Florida has no right to delay eradication and control of plant pests or diseases which may spread to and destroy agricultural property in Alabama, Georgia or other parts of the nation, any more than Respondents had a right to maintain citrus canker exposed plants on their property with the real and substantial threat of transmitting that disease to their neighbors.

Respondents, through expert testimony presented in this case, argued that there should have been no restriction even on the sale of their exposed citrus plants, stating "it's a matter of buyer beware." There is no doubt that the lack of effective regulation would return this state to a "buyer beware", self-protectionist philosophy, which in effect would be a return to the dark ages of agricultural commerce and disease control. Without the USDA's active involvement in eradication of plant diseases, the "buyer beware" attitude is likely to cause states to be wary of allowing commerce in agricultural commodities from other states. The widespread effect of the Florida citrus canker crisis is easily demonstrated by how other citrus producing states reacted to this public nuisance. During this crisis, the State of Florida was subjected to citrus embargoes and quarantine orders from numerous other citrus producing states, in addition to the USDA quarantine order cited in the Petition. After the USDA modified the quarantine on Florida citrus in February 1988 [*see* 53 Fed.Reg. 3999, amending 7 CFR 301.75], other citrus producing states again reacted by enacting or threatening embargoes of Florida citrus fruit.[9] Florida citrus growers have annual sales of more than $359 million to other citrus producing areas which could be lost in the event of future embargoes.

9. *See* Texas Department of Agriculture Emergency Rules 5.500-5.504; Louisiana Department of Agriculture Rule 7-9501 et. seq.

Florida has been successful in negotiating voluntary withdrawal of or obtaining injunctions against enforcement of these embargoes, *see e.g., Florida Citrus Mutual, et al. v. Hightower,* Order dated March 3, 1988, Case No. A-88-CA-159, U.S. District Court, Western District of Texas. In large part however, Florida officials have been successful in having these embargoes lifted due to the ongoing eradication effort in Florida based on the treatment and quarantine protocol established by the Citrus Canker Technical Task Force and the Joint Federal/State Citrus Canker Technical Advisory Committee. In the absence of a successful eradication, treatment and quarantine program, future embargoes from other citrus producing states, as well as foreign nations, such as Japan, are likely.

Some of the world's leading experts on citrus canker are members of the Citrus Canker Task Force and the Technical Advisory Committee which have formulated the policies that have influenced USDA and FDACS in adopting eradication measures and quarantine regulations which have had a substantial economic impact on the citrus growers as well as citrus nurseries. One of the ongoing restrictions on shipment of Florida citrus under the protocol established by the USDA with the advice of these committees is that in order to qualify for a certificate for interstate movement of fruit, the grove producing the fruit must be at least one-half mile from any property that has contained infested or exposed plants during the previous two years, and that in the area within five miles from the grove all infested or exposed plants have been destroyed. *See, e.g.,* 7 CFR Section 301.75-7(b). Thus, commercial citrus growers continue to face restrictions on movement of their fruit based on conditions on surrounding properties.

Agricultural industries have come to expect agricultural agencies to protect their properties from the spread of destructive pests and diseases. The lack of effective regulation may result in takings claims through the failure to provide adequate protection, as demonstrated by a case decided two years before the canker outbreak in Florida, *South Florida Growers Association, Inc. v. U.S. Department of Agriculture,* 554 F.Supp. 633 (S.D. Fla. 1982).

Thus, regulatory agencies are placed in the untenable position of potential liability for either action or inaction. Regulatory paralysis may be the ultimate consequence.

The determination of what constitutes a threat to public health and safety is a matter largely within the power of the legislature, and is not a judicial function. *Powell v. Pennsylvania,* 127 U.S. 678 (1888), cited with approval in *Keystone Bituminous Coal Association v. DeBenedictis, supra,* 94 L.Ed.2d at 491. As this Court observed more than 70 years ago in *Sligh v. Kirkwood,* 237 U.S. 52 (1914), in discussing the legislature's power to regulate the citrus industry:

> We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive market. . . . The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose. 237 U.S. at 61.

The Florida legislature has now delegated its power to the Florida Department of Agriculture and Consumer Services, just as Congress has delegated its power to the USDA.

Similar agencies exist in virtually every state. These agencies are staffed by agricultural and scientific experts with sufficient knowledge of plant pathology and animal husbandry to carry out the duties delegated to them for the protection of the public, for improvement of agricultural industry and for the protection of state and national economies and food supplies.

Agricultural inspection agents at state borders are not uncommon, and ordinary citizens daily suffer "takings" of

agricultural commodities which are not permitted to cross state lines. Criminal penalties for violation of agricultural regulations are also not uncommon, and civil liability against owners of diseased plants and animals who cause infection to third parties has also been recognized. It is impossible to reconcile these facts with the Florida court's determination that Respondents' Fifth Amendment rights were violated when the state agricultural officials destroyed their exposed plants.

The Amici Curiae are not suggesting that agricultural agencies be given absolute power or that the reasonableness of their actions be exempt from judicial review. Rather, we submit that the reasonableness of the regulation either as enacted or as applied be determined before any question of compensation can arise. If the regulation is reasonably justified for public health and safety purposes, a court should not be permitted to require compensation.

In this case, the Florida legislature and the USDA did make provisions for compensation to persons affected by citrus canker. This compensation was not in response to any perceived Fifth Amendment right, but was merely a recognition that the state and national economies would benefit by allowing the nurserymen affected by the eradication program a sum of money for replenishment of their crops. This type of compensation program is no different from any other form of disaster aid.

The writ should be granted in this case in order to clarify the legal rules applicable to destruction of infected or exposed plant and animals by agricultural agencies and to insure continued effective agricultural regulation as well as continued federal and state cooperation in agricultural programs. The litigation in this case has effects far beyond the immediate parties before the Court and has far reaching implications as to federal and state agricultural regulation and health and safety regulation in general.

CONCLUSION

The Amici Curiae urge the Court to grant the Petition for Writ of Certiorari, as requested by Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX TO GUIDELINES FOR THE EVALUATION OF RISK AND AVOIDANCE OF UNANTICIPATED TAKINGS (Part III, F., 5.)

Regulation in the Service of Public Health and Safety

[*See* Executive Order No. 12630, § 4(d); Guidelines, § V (C) (2)]

a. In General: Deference in Matters of Public Health and Safety

In evaluating government regulatory conduct under the Takings Clause, courts have evidenced a "hesitance" to find takings where the public purpose of the underlying legislation is to "restrain[ ] uses of property that are tantamount to public nuisances . . ." *Keystone Bituminous Coal Association v. De Benedictis,* 107 S. Ct. at 1245. Important to claiming the deference shown in such public nuisance regulation is recognition of the concept of "reciprocity of advantage" — that, in demonstrable ways, each who is regulated benefits from the similar regulation of others. *Id. Cf. Mugler v. Kansas,* 123 U.S. 623 (1887) (prohibition of liquor sale in interest of health, safety, or morals of public); *Euclid v. Ambler,* 272 U.S. 365 (1926) (in a facial challenge, conclusion that noise and traffic might be very nearly a public nuisance in an area; thus, regulations bore substantial relationship to public welfare); *Miller v. Schoene,* 276 U.S. 272 (1928) (nuisance rationale sustains state's destruction of cedar rust trees); *Goldblatt v. Hempstead,* 369 U.S. 590, 595-596 (1961) (safety based regulation prohibiting further excavation of sand and gravel mine below water table not unreasonable; plaintiffs' failed to meet burden of showing that prohibition would further reduce value of property or that regulation unreasonable).

b. Deference Not Coextensive with "Public Use"

Although "public use" for purposes of the Fifth Amendment is coterminous with the government police power (Section III(B)(3), *supra*) the deferential "nuisance exception" discussed here is not coextensive with the police power. *Keystone Bituminous Coal Association v. De Benedictis,* 107 S. Ct. at 1245, n.20. In other words, even when governmental action is designed to protect health and safety, some consideration of that action's economic impact may nevertheless be appropriate. Thus, *Florida Rock v.*

United States, 791 F.2d 893, 902 (Fed. Cir. 1986) has cautioned that a "regulation under the Clean Water Act can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe."

c. **Executive Order and Guidelines Requirements**

[*See* Executive Order 12630, § 5(d); Guidelines, § VI(A)]

With respect to public health and safety directed actions, then, management must, in any internal deliberative documents and any submissions to the Director, Office of Management and Budget, that are required:

i. Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

ii. Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;

iii. Establish to the extent possible, that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and,

iv. Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking. *See* § V, *infra.*

Under the Guidelines procedure, this reporting is accomplished by completion of the TIA process and consideration of the factors identified in Section V(C)(2) of the Guidelines for public health and safety actions. The "required submissions" are defined in Section VI(B) of the Guidelines.